No. 4015

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

QUONG DUCK,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

JOHN L. McNAB,
R. G. RETALLICK,
BYRON COLEMAN,
Attorneys for Plaintiff in Error.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 4015

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

QUONG DUCK,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

The plaintiff in error was indicted in the Northern Division of the Southern District of the State of California, upon two counts for violation of the opium act.

The case came on for trial before the Honorable Oscar A. Trippet, District Judge, on November 27th, 1922. After hearing the testimony and listening to the instructions at the hour of 3:00 o'clock P. M. on Tuesday, the 28th day of November, 1922, the jury retired to the jury room for the purpose of deliberating upon a verdict. (Transcript page 14.) At 4:00 o'clock P. M., the jury returned to the court-room and the following proceedings occurred:

> The COURT. Gentlemen of the jury, have you agreed upon a verdict?

The FOREMAN. We have not, your Honor.

The COURT. How does the jury stand; I want to know just how you are divided, not as to your vote whether guilty or not.

The FOREMAN. The jury stands eight to four.

The COURT. I don't understand, gentlemen of the jury, why a verdict has not been promptly returned in this case. You may retire to your chambers; I hope you will compose your differences, there ought to be a verdict reached in this case. Anything I can do to assist you, I will do it.

Whereupon the jury retires at 4:05 P. M. for further deliberation and at 4:20 P. M. return with the verdict of not guilty on the first count and guilty as charged in the second count of the indictment. (Trans. pp. 55 and 56.)

To these proceedings the plaintiff in error duly accepted. (See assignment of errors, Nos. 6 and 7, Trans. pp. 58 and 59.)

Argument.

IT IS REVERSIBLE ERROR FOR THE COURT TO ASK THE JURY, WHEN UNABLE TO AGREE, HOW THEY STOOD NUMERICALLY WITHOUT REFERENCE TO HOW MANY STOOD FOR CONVICTION OR ACQUITTAL.

Instructing a jury to reach a verdict after they have informed the court that they cannot agree, and telling them that a verdict ought to be reached in the particular case, amounts to coercion. A verdict so rendered is not the verdict of a jury, but the verdict of the court. Where, as in the case at bar, the jury stands 8 to 4, the remarks of the court

practically amount to a demand for the four jurors to concede their differences to the majority and bring in a verdict in favor of the wishes of the majority. This practice has been severely condemned by the United States Supreme Court, and this court also has held such a practice to be reversible error. The leading case is *Burton v. United States,* 196 U. S. 283, 49 L. Ed. 482.

In that case, after deliberating for 36 hours, the jury returned to court, and was asked by the judge how they stood. The foreman replied, "11 to 1". The court thereupon urged them to return and, if possible, arrive at a verdict. In condemning this practice, the United States Supreme Court said:

> "Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved.
>
> We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the

> proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain."

In *Peterson v. United States,* 213 Fed. 920 (9th Cir.), this court approved the Burton case and particularly called attention to the fact that while the error was serious in a case in which the jury stood 11 to 1, the situation was greatly aggravated in a case where they stood 7 to 5, as in the case before them.

The case at bar is more like the Peterson case because not only did the jury stand 8 to 4, showing that the facts were fairly evenly balanced in the minds of the jurors, but they brought in a verdict of acquittal on one count and of conviction on the second count. Who can tell but that the language of the court induced them upon returning to the jury room to compromise their differences of opinion by voting in this fashion. They could hardly have given much serious thought to the case after returning to the jury room, because within 15 minutes after their return, they reentered the court with their verdict. It is quite clear that the remarks of the court were greatly prejudicial. The remarks of Judge Dietrick in the Peterson case are directly applicable here.

Judge Dietrick said:

> "Although after continuous deliberation for nearly a day, the case was thus almost evenly

balanced in the minds of the jurors, and, after presumably all legitimate argument had been employed, the presiding judge addressed them in such a way as to leave the inference that the five should in some way defer to the seven. True, if a jury were very unequally divided, as, for example, eleven to one, it might not be improper, in a guarded manner and with appropriate qualifications, to suggest to the one the propriety of most carefully testing the correctness of his conclusion, in the light of the opposite views entertained by his eleven associates, presumably of equal intelligence and fairness. But here, without cautioning the jurors against yielding their honest, conscientious convictions, whatever they may have been, to mere numbers or to considerations of economy, the presiding judge unqualifiedly told them that 'the case should be finally disposed of as to all' defendants. 'The government has a right', it was said, 'to a verdict without farther expenditure of time and money.' And the instruction was closed by the expression of a 'belief' that the jurors could 'honestly come to an agreement'. The court might very well have expressed the hope for such an agreement, but it is difficult to conceive what basis there was at that juncture for believing that the jury could honestly agree. It is to be borne in mind that nowhere did the court make it clear that, however desirable it might be to avoid another mistrial and finally terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors. It was not correct to say that the government had a right to a verdict without farther expenditure of time and money; it had only a right to a fair consideration of the case. No obligation rested upon it to make any further expenditure, for, in case of a mistrial, it would have been the right, if not the duty, of the prosecuting offi-

cers to dismiss the prosecution. In any event, it was not its right to demand an agreement; nor did the defendant have such right. But one impression could have been left upon the minds of the jurors, and that such impression was made is borne out by the event. They retired, and in less than an hour returned with a verdict acquitting the one defendant and convicting the other, and this without any new light upon the law, or any further suggestion from the court as to the significance or character of any of the evidence in the case, and after the jury had deliberated the larger part of a day, with the resultant conviction upon their part that they could not get together. Can there be any question that, retiring with the impression that the all-important thing was a final disposition of the case, the jurors consciously or unconsciously bartered the acquittal of one defendant for the conviction of the other?"

It is respectfully submitted that the judgment in the case at bar should be reversed.

Dated, San Francisco,
June 6, 1923.

JOHN L. MCNAB,
R. G. RETALLICK,
BYRON COLEMAN,
Attorneys for Plaintiff in Error.